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No. 370

In the Supreme Court of the United States

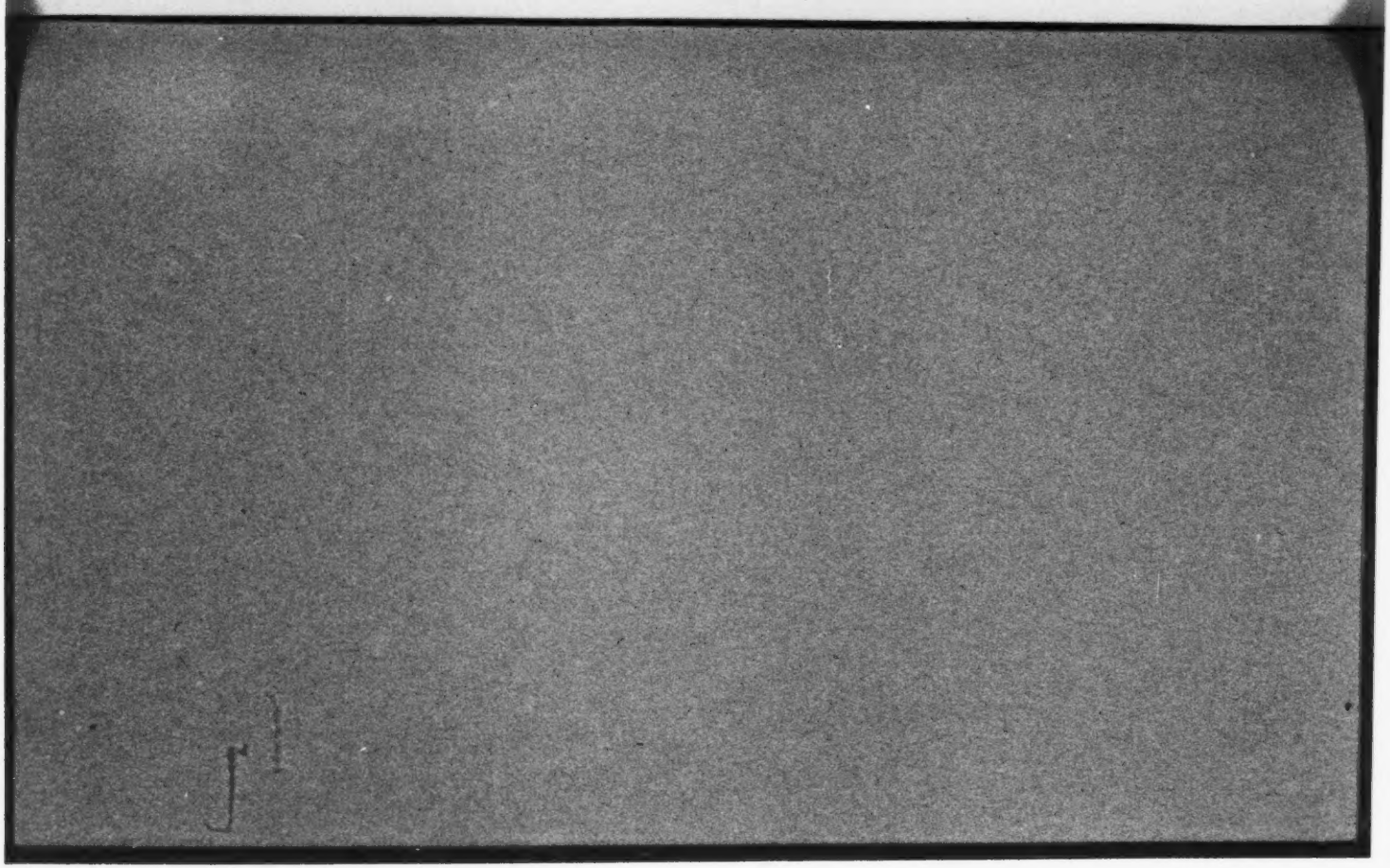
OCTOBER TERM, 1943

EDITH HENRY BARBOUR, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT



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EDITH HENRY BARBOUR, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

EDITH HENRY BARBOUR, a resident of the State of Michigan, by her counsel, prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above entitled case on June 22, 1943, reversing the decision of the United States Board of Tax Appeals, (now The Tax Court of the United States).

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 12-18) is reported in 44 B.T.A. 1117. The opinion of the Circuit Court of Appeals (R. 32-33) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 22, 1943 (R. 31). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where, under the laws of the State, the title and right to possession of property condemned for public use does not pass from the private owner to the political subdivision until the principal amount of the condemnation award, together with interest thereon as provided by law, is paid or secured, is the full amount required to be paid as a condition to the transfer of title and right of possession the sale price of the property and, hence, any gain measured by the difference between the full amount required to be paid and the cost of the property, taxable only as capital gain.

STATUTES INVOLVED

The applicable provisions of the Revenue Act of 1936 and the pertinent provisions of the City Charter of Detroit, and the Statutes of Michigan are set forth in the appendix hereto.

STATEMENT

The facts as stipulated by the parties (R. 22-27) were adopted by the Board of Tax Appeals as its findings (R. 12). The facts specifically referred to by the Board may be summarized as follows: In 1922 the Petitioner inherited an undivided one-half interest in three parcels of real

estate fronting on Woodward Avenue in Detroit, upon which were located three buildings which, since that time, have been used in the Petitioner's trade or business (R. 12-13).

In July, 1927, following the approval by the voters of the City of Detroit of a plan for widening Woodward Avenue, the City's Common Council passed a resolution for the necessity for the improvement, the resolution being conditioned upon the signing of financing agreements by at least 75% of the property owners to be affected. Such agreements were necessary because of the inability of the City to comply with the provisions of its Charter (Title VIII, Ch. 1, Sec. 16, Detroit City Charter, appendix, infra) and of the Michigan statutes (Michigan Compiled Laws (1929) Section 3801) requiring the payment for condemned property to be made within one year after confirmation of the condemnation award, and prohibiting the taking of possession until payment has been made. The required number of property owners signed such agreements, although the Petitioner and her joint owner did not (R. 13).

On or about November 17, 1927, the City of Detroit, pursuant to the provisions of its Charter, filed with the Recorder's Court of the City a petition setting forth that the necessity for widening Woodward Avenue had been declared, and that to accomplish such purpose it was necessary to condemn certain property including 20 feet of the parcels of real estate owned by the Petitioner and her joint owner. The proceedings were, in due course, brought on for trial and a written verdict of the jury was rendered on February 16, 1932, finding the taking of the requisite portions of the three parcels to be necessary and awarding as compensation the sum of $180,935.90 for the condemned

portion of the parcel occupied by one of the buildings. The verdict was confirmed by the Recorder's Court on July 21, 1932, resulting in the condemnation of 20 feet of the premises occupied by the three buildings (R. 13).

On November 26, 1937, the City paid to the Petitioner and her joint owner the sum of $180,935.90, the amount awarded for the condemned portions of one of the parcels. The Petitioner's share of the sum so awarded exceeded her portion of the cost basis of the land and building which had been condemned and for which the award was paid. The judgment award for the condemned portions of the other two parcels had not been paid at the time of the hearing of this proceeding and possession had not been taken of any part of the condemned property by the City (R. 13-14).

On December 21, 1937, the City paid to the Petitioner and her joint owner the further sum of $48,345.97, being interest upon the award of $180,935.90 from July 21, 1932, the date of the confirmation of the award, to November 26, 1937, the date the award was paid, as prescribed by Section 14,555, Compiled Laws of Michigan, 1929.*

During the years 1932 to 1937, inclusive, the Petitioner received and retained her one-half share of the rentals of the entire three buildings and, beginning with the year 1933, the City eliminated the condemned portion of the properties from City taxation (R. 14).

Upon her income tax return for 1937, the Petitioner reported $24,172.98 representing her share of the interest

* The Board found, as was stipulated by the parties, that the interest so paid was from the period July 21, 1932, to December 21, 1937. This latter date was stated in the stipulation and the findings through error, as the amount of interest paid represents 5% of the principal of the award from the date of the confirmation to the date of the payment of the award, November 26, 1937, as required by the Michigan statute. (R. 14.)

as ordinary income taxable in full. Before the Board of Tax Appeals, the Petitioner contended that the said sum of $24,172.98 is taxable as a capital gain rather than as ordinary income (R. 14).

The Board of Tax Appeals sustained the Petitioner and held that since, under the laws of Michigan, there must be set aside in the City Treasury, before the City can take possession of the property, the amount required to make compensation, which amount includes interest as well as the principal of the award, the whole sum is necessary to pay for the property whether there be two awards or one (R. 16-17).

The Circuit Court of Appeals reversed the Board on the ground that the just compensation to which the Petitioner was entitled was the principal amount of the award as fixed by the verdict of the jury, to-wit, $180,935.90, which amount, it held, was the sales price, citing in support of such holding the decision of this Court in *Kieselbach, et al.*, v. *Commissioner,* 63 S. Ct. 303 (R. 33).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the principal amount of the award as fixed by the verdict of the jury constituted the sales price of the property condemned.

2. In failing to hold that under the laws of Michigan the sales price of property condemned for public use is the full amount required to be paid as a condition to the transfer of title and the right to possession, including the principal of the award and the interest thereon as provided by law.

3. In holding that the Petitioner's share of the interest upon the principal amount of the award is taxable as ordinary income.

4. In failing to hold that the gain realized by the Petitioner, measured by the difference between the full amount required by law to be paid as a condition to the transfer of title to the property, both principal award and interest, and the cost basis of such property is taxable only as capital gain.

5. In reversing the decision of the United States Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

1. The decision of the Circuit Court of Appeals is probably in conflict with the decision of this Court in *Kieselbach et al.* v. *Commissioner,* supra. In that case, involving the condemnation by the City of New York of private property, the title and ownership of the property passed, under the laws of New York, at the time that the City's Board of Estimate directed that the title should vest in the City, which was several years prior to the date of the judgment in the condemnation proceedings, fixing the amount of compensation to be paid for the property. The City, however, took possession of the property on the date specified in the resolution of its Board of Estimate. Inasmuch as, under the law of New York, the title and possession to the property passed at the time specified in the resolution, this Court held that the sale took place on that date, and that the subsequent proceedings fixing the amount of the award established the sale price of the property at the time of the transfer of title and the completion of the sale.

The interest allowed on the award from the date of the passing of title, and the consummation of the sale, to the date of payment, was considered merely compensation for delay in payment, and not a part of the sale price since the sale had taken place several years prior to the judgment fixing the award and the judgment, itself, fixed the sale price of the property at that time.

In the instant case, the title and right to possession of the property did not pass to the City at the time the judgment confirming the award was entered and, under the laws of Michigan, could not pass until such judgment, together with the interest thereon required by law, was actually paid or secured. *Anderson Trust Co.* v. *Life Ins. Co.*, 302 Mich. 575, 588. The judgment confirming the award, although a final judgment and determinative of the rights of the parties, did no more than determine the just compensation for the property at the date of the judgment and represents simply a determination of the value of the property at that date. See *Campau* v. *City of Detroit*, 225 Mich. 519, 523. Such judgment could not fix the full compensation to which the private owner is entitled as a condition to the transfer of the title and possession of the property, or, in other words, the full sale price of the property, for the reason that the transfer could not be made and the sale could not be completed until the full amount of the award and interest, as required by law, is actually paid or secured. See *Rosen* v. *City of Detroit*, 242 Mich. 690, 692.

In the *Kieselbach, et al.* case, supra, this Court held that the sale took place when possession of the property was taken and the title passed, and that the amount fixed as compensation for the property on that date constituted the sale price. Accordingly, in the instant case, the sale took place only when the amount of the award, together with the

interest thereon required by law, was paid or secured, and the sale price was the full amount required by law to be paid at that time for the property.

The mere fact that a portion of the aggregate sum required to be paid as a condition to the passing of title and right of possession is designated as interest is not material. The name by which some element of the total amount to be paid is called is of no significance. The determinative question is, what is the sale price? See *Kieselbach, et al.*, supra.

Since the aggregate sum required by law to be paid for the transfer of title and possession of the property, both principal and interest, constitutes the sales price, it follows necessarily that the excess of such aggregate sum over the cost basis of the property to the petitioner is the gain from the sale of the property and, under the applicable statute, such gain is taxable only at the specified capital gain rates. See Section 111 and Section 117 of the Revenue Act of 1936, infra.

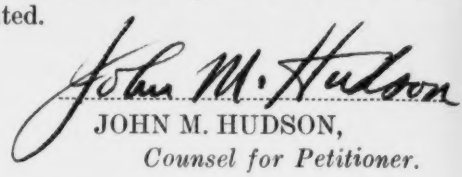
2. The Circuit Court of Appeals, in the instant case, has decided a question of general importance in the administration of the Revenue Laws of the United States which, it is believed, has not been, but should be, settled by this Court. In deciding this question, it is believed that the Circuit Court of Appeals has erroneously interpreted the decision of this Court in *Kieselbach, et al.*, supra, and has applied that decision in a manner contrary to the intent of this Court.

The general importance of the question here involved is evidenced by the large number of States in which the rule prevails, as in the State of Michigan, that the title and right of possession to private property condemned for pub-

lic use does not pass from the private owner to the public authority until the full amount of the just compensation required by law to be paid therefor is actually paid or secured to the private owner. Among the States in which such rule obtains are Louisiana, (see *State* v. *Ellis*, 113 La. 555); Indiana, (see *Pittsburgh, etc. R. Co.* v. *Sedwick*, 72 Ind. App. 131, 136); Maryland, (see *Dunne* v. *State*, 162 Md. 274, and *Building and Loan Assn.* v. *Safe Deposit & Trust Co.*, 166 Md. 348, 351); Missouri, (see *Jasper Land and Improvement Co.* v. *Kansas City*, 293 Mo. 674); New Hampshire, (see *Manchester, etc. R. Co.* v. *Keene*, 62 N. H. 81, 121, 123); Arkansas, (see *Cannon* v. *Felsenthal*, 180 Ark. 1075, 1080); Florida, (see *Casa Loma Springs Development Co., et al.* v. *Brevard County*, 112 So. 60 (Fla.) and *Spafford* v. *Brevard County*, 110 So. 451 (Fla.)); California, (see *Bensley* v. *The Mountain Lake Water Co.*, 13 Calif. 306, 314) and Texas, (see *Vernon's Texas Statutes* (1936) —*Revised Civil Statutes*, Title 52, Article 3268).

CONCLUSION

It is respectfully submitted that this Petition for Writ of Certiorari be granted.



JOHN M. HUDSON,
Counsel for Petitioner.

Dated: September 18, 1943.

OF COUNSEL:

BULKLEY, DICKINSON, WRIGHT & DAVIS,
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APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

Sec. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

(a) *Computation of gain or loss.* The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113(b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) *Amount realized.* The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

* * *

Sec. 117. CAPITAL GAINS AND LOSSES.

(a) *General Rule.* In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:

100 per centum if the capital asset has been held for not more than 1 year;

80 per centum if the capital asset has been held for more than 1 year but not for more than 2 years;

60 per centum if the capital asset has been held for more than 2 years but not for more than 5 years;

40 per centum if the capital asset has been held for more than 5 years but not for more than 10 years;

30 per centum if the capital asset has been held for more than 10 years.

(b) *Definition of capital assets.* For the purposes of this title, "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

* * *

Detroit City Charter, Title VIII, c. 1:

Sec. 1. The council of the city of Detroit is hereby authorized to take private property for the use and benefit of the public within the limitations of the state constitution, and to institute and prosecute proceedings for that purpose. Provided, that this chapter shall not apply to cases where proceedings have already been instituted under any laws in force prior to the taking effect of this charter; and Provided, further, that nothing herein contained shall be held to abridge the right of said city to take private property for the use and benefit of the public under other acts to which resort may be had for said purpose.

Sec. 2. Such proceedings may be commenced and prosecuted under this chapter whenever the common council shall have declared a public improvement to be necessary in the municipality, and shall declare that it deems it necessary to take private property, describing it, for such public improvement designating it, and that the improvement is for the use or benefit of the public. It shall, by resolution direct the corporation counsel to institute the necessary proceedings in behalf of the municipality in the recorder's court of said city, to carry out the object of the resolution in regard to taking private property for the city. Before the institution of such proceedings, the council shall, if it be intention to assess any part of the damages awarded in such proceedings upon a special or local district, declare by resolution such purpose and fix such district, embrac-

ing only such real esate as in its opinion will be specially benefited by the improvement and it shall describe such district with reasonable certainty by well known boundaries, so that all persons owning real estate in such district may readily ascertain the facts.

* * *

Sec. 8. The jury shall determine in its verdict the necessity for the proposed improvement and for taking such private property for the use or benefit of the public for the proposed improvement, and in case they find such necessity exists, they shall award to the owners of such property and others interested therein such compensation therefor as they shall deem just. If any such private property shall be subject to a mortgage, lease, agreement or other lien, estate or interest, they shall apportion and award to the parties in interest such portion of the compensation as they shall deem just. (Sec. 3793, Mich. Comp. Laws [1929].)

* * *

Sec. 10. The verdict of the jury may be set aside by the court and a new trial ordered as in civil suits at law in the circuit courts of this state. Amendments either in form or substance may be allowed in any paper, petition, process, record or proceedings, or in the description of the property proposed to be taken, or the name of any person, whether contained in the resolution passed by the common council or otherwise, whenever the amendment will not interfere with the substantial rights of the parties. Any such amendment may be made after, as well as before, judgment confirming the verdict of the jury.

Sec. 11. Motions for a new trial or to arrest the proceedings shall be made within two days after the rendition of the verdict, unless further time is allowed by the court; and if no such motion is made, or, being made, is overruled, the court shall enter an order or judgment confirming the verdict of the jury; and such judgment or confirmation, unless reversed by the supreme court, shall be final and

conclusive as to all persons interested therein. (Sec. 7209, Mich. Comp. Laws [1929].)

Sec. 12. Any person whose property may be taken (and any such taxpayer, party to the proceedings under this chapter), considering himself aggrieved, may appeal from the judgment of the court confirming the verdict of the jury, by filing in writing, with the clerk of said court, a notice of such appeal within five days after the confirmation, and within the same time serving a copy thereof on the corporation counsel and filing a bond in said court, to be approved by the judge thereof, conditioned for the prosecution of said appeal to judgment, and the payment of all costs, damages and expenses that may be awarded against him in case the judgment or confirmation shall be affirmed. Such appeal shall be perfected within the same time and prosecuted as an appeal in chancery, as near as may be, subject to the provisions of this chapter.

Sec. 16. Within one year after confirmation of the verdict of the jury, or after the judgment of confirmation shall on appeal be confirmed, the common council shall set apart and cause to be provided in the treasury, unless already provided, the amount required to make compensation to the owners and persons interested for the private property taken as awarded by jury, and shall in the resolution setting apart and providing said sum, if not already provided, direct the city treasurer to pay to the persons respectively entitled to the money so set apart and provided, to each his or her proportion, as ascertained and awarded by said verdict. And it shall be the duty of the treasurer to securely hold such money in the treasury for the purpose of paying for the property taken, and pay the same to the persons entitled thereto, according to the verdict of the jury, on demand, and not pay out the money for any other purpose whatever. The council shall provide the necessary money by tax levy and/or by the issuance and sale of general public improvement bonds, and/or by the issuance and sale of special assessment bonds and/or as it may otherwise provide; Provided, that the council

shall not pay or cause to be paid any such award or judgment by borrowing from moneys or funds in the treasury which have been raised, received or appropriated for other purposes. Whenever the necessary sum is actually in the treasury for such purpose, the treasurer shall make and sign duplicate certificates, verified by his oath, showing that the amount of compensation awarded by the jury is actually in the treasury for such purpose, the treasurer shall make and sign duplicate certificates, verified by his oath, showing that the amount of money is in the treasury for payment of the award for the private property taken in the case, giving the title of the case, and shall cause one of the certificates to be filed in the office of the clerk of the court in which the proceedings were had and the other to be filed with the city clerk, which certificate shall be prima facie evidence of the matters herein stated. Whenever the amount of the compensation is in the treasury and thus secured to be paid, the council may enter upon and take possession of and use such private property for the purpose for which it was taken, and may remove all buildings, fences and other obstructions therefrom. In case of resistance or refusal on the part of anyone to the council or its agents and servants entering upon and taking possession of such private property for the use and purpose for which it was taken, at any time after the amount of the compensation aforesaid is actually in the treasury ready to be paid to those entitled thereto, the council, by the corporation counsel, may apply to the court, and shall be entitled, on making sufficient showing, to a writ of assistance to put the city in possession of the property. (As amended November 3, 1931. In effect November 10, 1931.)

* * *

Sec. 19. The council shall not have power to discontinue proceedings hereunder after the rendition of the verdict of the jury, but it may direct the corporation counsel to move for a new trial or to arrest the proceedings, or to take an appeal to the supreme court, and in any

such case the same proceedings shall be taken as are hereinafter prescribed in the case of like proceedings on the part of any respondent, except that no bond shall be required, nor shall the municipality be required to pay the clerk of the recorder's court fees.

Michigan Compiled Laws (1929):

Sec. 14555. Interest on judgment or decree. Sec. 20. When execution shall be issued upon any judgment or decree, interest on the amount thereof from the time of entry of the same until such amount shall be paid, shall be collected at the rate of five (5) per cent per annum: *Provided,* That on a judgment or decree rendered on any written instrument having a different rate, if such rate was legal at the date of the execution of such instrument, the interest shall be computed at the rate specified in such instrument.

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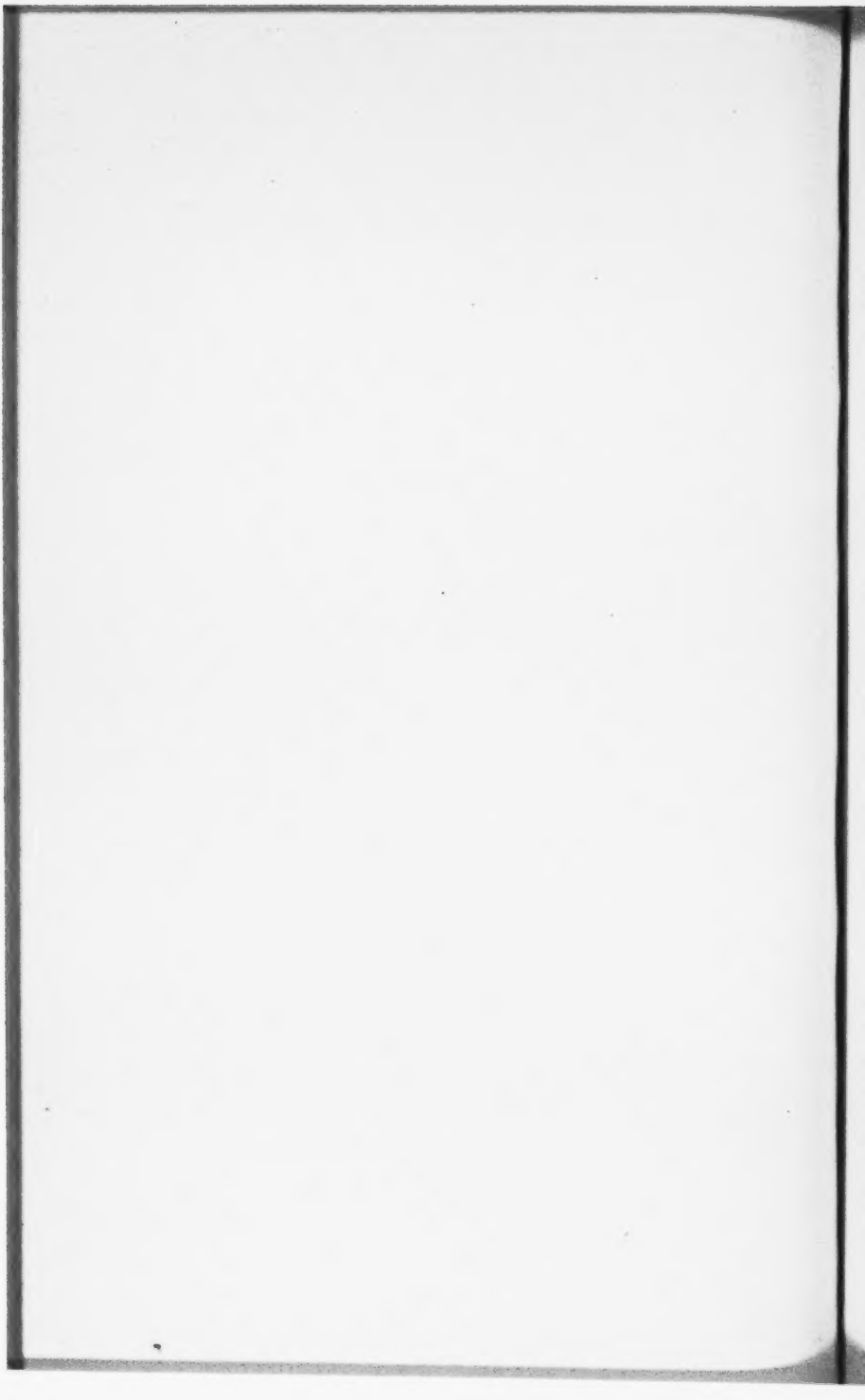

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EDITH HENRY BARBOUR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 12–18) is reported in 44 B. T. A. 1117. The opinion of the Circuit Court of Appeals (R. 32–33) is reported in 136 F. 2d 486.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 22, 1943 (R. 31). The petition for a writ of certiorari was filed September 21, 1943. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the interest paid on a judgment confirming a condemnation award was taxable as ordinary income under Section 22 (a) of the Revenue Act of 1936 rather than as capital gain under Section 117 (a) of the Revenue Act of 1936.

STATUTES INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC 22. GROSS INCOME.
>
> (a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *
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> * * * * * *
>
> SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.
>
> (a) *Computation of gain or loss.*—The gain from the sale or other disposition of property shall be the excess of the amount

realized therefrom over the adjusted basis provided in section 113 (b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) *Amount realized.*—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

* * * * *

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *General Rule.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:

100 per centum if the capital asset has been held for not more than 1 year;

80 per centum if the capital asset has been held for more than 1 year but not for more than 2 years;

60 per centum if the capital asset has been held for more than 2 years but not for more than 5 years;

40 per centum if the capital asset has been held for more than 5 years but not for more than 10 years;

30 per centum if the capital asset has been held for more than 10 years.

* * * * *

(Pertinent local laws are set forth in the Appendix to the petition.)

STATEMENT

In 1922 taxpayer inherited an undivided one-half interest in three parcels of real estate fronting on Woodward Avenue in the City of Detroit, Michigan. The three buildings located on this property were thereafter used in taxpayer's trade or business. (R. 12–13.)

In July 1927, following approval by the Detroit voters of a plan for widening Woodward Avenue, the city's common council passed a resolution declaring a necessity for the improvement, conditioning the resolution, however, upon the signing of financing agreements by at least 75% of the owners of the property to be affected. Such agreements were necessary because of the city's inability to comply with the provisions of its charter and of the Michigan statutes requiring condemned property to be paid for within one year after confirmation of the condemnation award and prohibiting the taking of possession until such payment has been made. The requisite number of property owners signed the agreements, although taxpayer and her joint owner did not. (R. 13.)

Pursuant to the condemnation provisions of its charter, the city filed a petition with the recorder's court on November 17, 1927, setting forth that the city had declared the public necessity for widening Woodward Avenue and alleging that the accomplishment of this purpose necessitated the

condemnation of certain property, including 20 feet of the three parcels of real estate in which taxpayer was a joint owner. The proceedings thus instituted were eventually brought to trial, and on February 16, 1932, the jury delivered a written verdict, finding the taking of the specified portions of the three parcels necessary and awarding compensation therefor. The sum of $180,935.90 was fixed for the condemned portion of one of the parcels occupied by one of the three buildings. On July 21, 1932, the recorder's court entered a judgment confirming this verdict. (R. 13.)

On November 26, 1937, the city paid taxpayer and her joint owner the specified sum of $180,935.90. On the date this award was paid, taxpayer's share of this amount exceeded her portion of the cost basis of the land and building in respect of which the award was paid. (R. 13–14.)

The judgment award for the condemned portions of the other two parcels had not been paid on the date of the hearing before the Board, and possession of none of the condemned portions of the three parcels had been taken at that time. During the years 1932 to 1937, inclusive, taxpayer received and retained her one-half share of the rentals of the entire three buildings. In 1933, the assessments on the three properties were adjusted in such a manner as to free the condemned portions from city tax. (R. 14.)

On December 21, 1937, the city paid to taxpayer and her joint owner the further sum of $48,345.97, being interest upon the award of $180,935.90, from July 21, 1932, the date on which the award was confirmed, to December 21, 1937, at the rate of 5% per annum, as prescribed by Section 14555, Michigan Compiled Laws (1929) (R. 14).

On her 1937 return taxpayer reported her one-half share of the $48,345.97 interest ($24,172.98) as ordinary income, taxable in full. The Commissioner asserted a deficiency as to other items, not material here (R. 6–9), and the taxpayer petitioned the Board of Tax Appeals claiming overpayment and contending that the $24,172.98 was taxable as capital gain rather than as ordinary income. (R. 13.) The Board sustained her contention (R. 17), and determined that there was an overpayment of income tax for 1937 in the amount of $3,885.81 (R. 18), instead of a deficiency of $816.11 as determined by the Commissioner (R. 6, 12). The court below reversed (R. 31).

ARGUMENT

The decision below is in accord with *Kieselbach* v. *Commissioner,* 317 U. S. 399. The facts here differ from those in the *Kieselbach* case in but two particulars: (1) In the *Kieselbach* case, the portion of the award computed as interest was not paid as interest; New York law required such interest to be paid "as part of the compensation" (317 U. S. at p. 401). Here, the interest was

paid not as a part of, but in addition to, the "compensation" for the property. The latter was established by the jury's verdict, pursuant to the Detroit City Charter, Title VIII, c. 1, Sec. 8 (Pet. 13), as confirmed by the judgment of the recorder's court. The interest was paid on the judgment pursuant to a general statute—Compiled Michigan Laws (1929), Section 14555 (Pet. 16)—providing for interest at five percent on judgments and decrees. See *Campau* v. *City of Detroit,* 225 Mich. 519; *Morgan* v. *City of Detroit,* 251 Mich. 63.[1] This factual difference between the two cases obviously favors the Commissioner, not the taxpayer.

(2) In the *Kieselbach* case, the City of New York acquired title and took possession of the condemned property prior to payment of the condemnation award. Here, the City of Detroit, under Title VIII, c. 1, Section 16 of its charter (Pet. 14–15), could not acquire possession, or perhaps title, until the condemnation award was paid or the payment secured. On this basis, the taxpayer attempts to distinguish the cases, arguing (Pet. 7–8) that here the "sale" did not take place until payment was made, and that the aggregate sums paid in 1937 constituted the sale price. But

[1] In the *Morgan* case the Supreme Court of Michigan said (251 Mich. at p. 65):

> The judgment in condemnation draws interest because it is a judgment, and because the statute provides that judgments draw interest.

the fallacy of this is the assumption that the sale price was not, and could not be, determined prior to payment. In fact, the "sale" here became binding as of the time the condemnation award was confirmed by court decree. *Campau* v. *City of Detroit, supra.*[2] "The rights of the parties were concluded by confirmation of judgment, both as to amount of award and the premises taken." *Cleaver* v. *Board of Education,* 263 Mich. 301, 305. Due to the delay in payment, the taxpayer became entitled to interest on the judgment, but this clearly was "indemnification for delay, not a part of the sale price" (*Kieselbach* v. *Commissioner,* 317 U. S. at p. 404), which was unalterably fixed. Payment of the additional amount was required simply "for the use or forebearance of money" (*Deputy* v. *du Pont,* 308 U. S. 488, 498). Cf. *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552,

[2] In analyzing the effect of the judicial confirmation of the condemnation award the court said (p. 524):

> It amounts to a present forced sale of the property at the then cash value awarded, giving the purchaser, however, on or before a year from date in which to pay for it.

The court also stated (p. 531):

> When judgment was entered upon the award and no appeal taken, the rights and obligations of the parties were legally adjudicated and fully fixed. The amount of defendant's indebtedness for the land it compelled plaintiff to sell was as finally and forcibly determined as by any other judgment. Its absolute right and title to the property only awaited payment of a judgment, based on just compensation for the property at the time it was rendered.

560–561. Hence, it was not only designated "interest" but was interest. And the situation is not changed by the fact that the taxpayer obtained what is seemingly a windfall in collecting rents from the date of the award to the date of payment (*supra*, p. 5).

CONCLUSION

The decision of the court below is correct. There is no conflict. The petition should be denied.

Respectfully submitted,

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